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No. D-464

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD BYRNE,

Petitioner,

v.

THE MASS TRANSIT ADMINISTRATION
AND
AMALGAMATED TRANSIT WORKERS UNION
DIVISION 1300, AFL-CIO,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether The National Labor Relations Act Is Applicable To A Dispute Between A State Agency Employer And Its Public Employee?

II. Whether Section 13(c) Of The Urban Mass Transportation Act Of 1964, A Federal Funding Statute, Supersedes State Law And Confers A Federally Derived Right Of Fair Representation Enforceable Against A State Employer?

STATEMENT OF PARTIES TO THESE PROCEEDINGS

The Petitioner, Richard Byrne, an employee of the State of Maryland, was the Plaintiff, and Appellant below. The Mass Transit Administration, an agency of the State of Maryland, and Amalgamated Transit Workers Union, Division 1300, AFL-CIO, were the Defendants and Appellees below.

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LOWER COURT OPINIONS

The ruling of the Memorandum and Order of Judge Norman P. Ramsey, of the United States District Court for the District of Maryland is unpublished and appears in the Appendix. The ruling of the Circuit Court Of Baltimore City of the State of Maryland is unpublished and appears in the Appendix. The Opinion of the Court of Special Appeals of Maryland appears at 58 Md. App. 501, 473 A.2d 956 (Md. App. 1984) as well as in Petitioner's Supplemental Appendix and the Order of the Court of

Appeals of Maryland denying Certiorari is found in the Appendix to the Petition For A Writ Of Certiorari.

STATEMENT OF THE CASE

The Petitioner, Richard Byrne ("Byrne"), was discharged by his state agency employer for theft of MTA property after exhaustion of MTA grievance hearings and a full evidentiary hearing before an Arbitrator, during which he was represented by Respondent Amalgamated Transit Workers Union, Division 1300, AFL-CIO ("Union") and its counsel, Bernard W. Rubenstein, Esq.

Byrne thereafter simultaneously filed two identical actions against the MTA and the Union, the first in the United States District Court for the District of Maryland and the other in the Circuit Court for Baltimore City. Both actions were expressly brought under the authority of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, *et seq.* and grounded in an alleged breach of the duty of fair representation by the Union.

On November 23, 1982 Judge Norman P. Ramsey granted the Defendants' Motions to Dismiss. Judge Ramsey held that the LMRA particularly in light of Sec. 152 thereof could not apply because the coverage of the Act does not extend to the MTA, as a State Agency, or to its employees. (A copy of that opinion is appended, marked Exhibit "A"). Petitioner did not appeal.

Judge J. Harold Grady of the Circuit Court for Baltimore City subsequently granted MTA's Motions Raising Preliminary Objection and for Summary Judgment and sustained the Union's Demurrer to identical claims filed with that Court, again alleging jurisdiction under the federal LMRA.

The Court of Special Appeals affirmed the lower Court's decision as to the MTA, holding that: (1) the federal LMRA confers no coverage and therefore no jurisdiction over a state agency employer and its employees and (2) the decision of the Arbitrator was "final and binding" by MTA's enabling, authorizing statutory provision. Transp. Art. § 7-602(d). Petitioner Byrne has requested this Court to issue a *Writ of Certiorari* to review this component of the Court of Special Appeals Opinion. With respect to the Union, the Court of Special Appeals reversed and remanded with instructions that the Trial Court permit an amendment to allow Byrne to state a cause of action for breach of contract against the Union. The Court of Special Appeals recognized that a private cause of action for breach of the duty of fair representation can lie against the Union under state law, pursuant to a breach of contract theory.

The Petitioner then filed a Petition For Writ Of Certiorari in the Court of Appeals of Maryland on May 29, 1984. That Petition was denied by that Court September 14, 1984.

ARGUMENT

I.

REVIEW IS INAPPROPRIATE BECAUSE STATE AND LOCAL GOVERNMENT EMPLOYERS AND THEIR EMPLOYEES ARE EXEMPT FROM COVERAGE UNDER THE LABOR MANAGEMENT RELATIONS ACT.

The Petitioner maintains that the Court of Special Appeals of Maryland erred in holding that the duty of fair representation did not arise under the Federal LMRA in this action by a State employee against his State employer. *Byrne v. Mass Transit Administration*, 58 Md. App. 501, 473 A.2d 956 (1984) (hereinafter "*Byrne*"). In fact, the Court of Special Appeals and the United States

District Court correctly held that there could be no jurisdiction to maintain an action against the MTA under the LMRA because the express language of that Act precludes any claim by a state agency employee against his/her state government employer.

Section 152(2) of the LMRA (Wagner Act) expressly excludes from the definition of an "employer" "any wholly owned Government Corporation, . . . *or any State or political subdivision* thereof . . . ." (emphasis by Court) (p. 4). The MTA is clearly a State agency, Md. Transp. Code Ann. § 7-101 *et seq.* (1979); *MTA v. Household Finance Corp.*, 292 Md. 313, 314, 439 A.2d 1104, 1105 (1982); *Harden v. MTA*, 277 Md. 399, 354 A.2d 817 (1976); and therefore is not a covered employer. Moreover, public transit employers and employees are excluded from the provisions of the federal LMRA. *Crilly v. Southeastern Pennsylvania Transportation Auth.*, 529 F.2d 1355 (3rd Cir., 1976). *See also Ayres v. I.B.E.W.*, 666 F.2d 441 (9th Cir., 1982); *A.T.U. Div. 819 v. Byrne*, 568 F.2d 1025, 1029 (3rd Cir. 1977). Consequently, the Maryland court correctly held that "an action against the MTA under claim of the LMRA will not lie." 473 A.2d at 959.

This Court has already held that disputes between publicly owned municipal transit systems and their employees are not subject to the National Labor Relations Act.

> "Thus, Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers. Section 13(c) would not supersede state law, *it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations.*" (Emphasis supplied).

Jackson Transit Authority v. Local Division 1285, ATU, 457 U.S. 15, 27, 102 S. Ct. 2202, 2207 (1982) ("*Jackson*") (Blackmun, J. for unanimous Court). This Court recently reiterated this state and local exemption from the NLRA. See *Garcia v. San Antonio Metro. Transit Auth.*, Nos. 82-1913 and 82-1951 (Feb. 19, 1985) Slip Opinion at p. 24. *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 223, 97 S. Ct. 1782 (1977).

The MTA is not an "employer" within the meaning of the LMRA. Therefor its workers cannot be "employees" as required for standing under the Act. Section 152(3) (the Wagner Act) expressly excludes from its coverage those workers employed by employers, like the MTA, not covered by the Act. 29 U.S.C. § 152(3) (1976).[1] Thus, Petitioner has no standing under the Act and the asserted underlying basis for Petitioner's claim, the LMRA, is not applicable.

Petitioner then asserts that in enacting the LMRA, Congress has conferred upon state and local employees federal rights arising under that Act which preempt state law under the Supremacy Clause of the United States Constitution. It must be self evident that by excluding public employers and employees from the federal labor acts, Congress expressly declined to preempt state law. Therefore, the applicable state law must apply. As Chief Judge Gilbert of the Maryland Court of Special Appeals observed in his opinion in *Byrne*, the express statutory requirement of § 7-602(d) of the Maryland Transportation Article requires that the decision of the Arbitrator in grievances "is final and binding on all disputed matters." *Id.* at 959. The statute is clear, there are no exceptions. The Arbitrator, after full hearing, upheld the discharge. That decision, by statute, must be final and binding upon the parties except where an arbitrator exceeds his authority.

[1] Inexplicably Petitioner relies upon the Wagner Act in support of his preemption theory.

Thus, the applicability of the LMRA to this dispute between a state employer and its employee presents no novel issues of statutory construction requiring this Court's review and analysis. The express terms of the federal labor laws, and the applicable case law preclude any need for further consideration.

II.

SECTION 13(c), URBAN MASS TRANSPORTATION ACT DOES NOT APPLY.

Petitioner contends that the duty of fair representation has been preserved as a collective bargaining right, pursuant to Section 13(c) of the Urban Mass Transportation Act (UMTA) of 1964, 49 U.S.C. § 1601 et seq., a federal funding statute.

First, the duty of fair representation is not a collective bargaining right, and thus not within the purview of the asserted language of UMTA § 13(c). Second, such rights cannot invalidate, supersede or pre-empt State law. Relationships between local transit authorities and their unions are to be governed by State law and not the National Labor Relations Act. Finally, it was never intended that § 13(c) create a permanent set of specific collective bargaining conditions.

Even if § 13(c) does preserve collective bargaining rights, the duty of fair representation is not a collective bargaining right. Those rights are contractual, won by the union for the employees, in negotiations with the employer. The duty of fair representation is the union's statutory duty judicially implied from the NLRA. *Bowen v. United States Postal Service,* 459 U.S. 212, 103 S. Ct. 588, 604 (1983); C. Morris, *The Developing Labor Law,* "The Duty of Fair Representation, at 1285 (BNA, 1983)." Therefore, neither § 13(c) nor *Jackson* is relevant to this issue. Both address only with employer-union contract rights.

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Even if the right of fair representation were a collective bargaining right, state law, not federal would control.

Petitioner maintains that federal labor law applies to disputes between these parties by means of § 13(c) and the Supremacy Clause of the United States Constitution, Article 6, Clause 2. According to Petitioner, Congress, through § 13(c) evidenced its intent to preempt the entire field of public urban mass transportation labor relations. Petitioner cannot assert Congressional preemption in the face of this Court's pronouncement in *Jackson*, at 457 U.S. at 23, 27, that "Section 13(c) evinces no congressional intent to upset the decision in the National Labor Relations Act to permit state law to govern the relationships between local governmental entities and the unions representing their employees," and that:

> "*Section 13(c) would not supersede state law*, it would leave intact the exclusion of local government employers from the National Labor Relations Act and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations." (Emphasis supplied).

In *Crilly, supra*, the Court of Appeals for the Third Circuit squarely held that Congress did not intend to preempt the labor relations between that public transit authority and its union.

Petitioner further asserts that under the Supremacy Clause, those rights arising under UMTA § 13(c) "cannot be vitiated by State action." This Court disagreed. "Section 13(c) would not supersede state law. . . ." *Jackson*, 457 U.S. at 27; *Local Division 589, ATU v. Massachusetts*, 666 F.2d 618, 633 (1st Cir. 1981), *cert. denied*, 102 S. Ct. 2928 ("*§ 13(c)*, . . . is not intended to lead to the invalidation of any state law.").

The First Circuit court also held that a state law, passed subsequent to UMTA § 13(c) collective bargaining as-

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surances, could take precedence over any particular § 13(c) assurance. *Id.* Therefore, the plain language of § 7-602(d) of the Transportation Article must prevail over any UMTA § 13(c) assurances.

Petitioner's position that § 13(c) guarantees all collective bargaining terms permanently also has been rejected. Congress intended only "limited," "provisional protections" to ease the "transitional effects" from the private to the public sector. *Id.*

Thus, Petitioner raises no new issues of statutory construction arising under § 13(c). This Court resolved all issues raised here with its opinion in *Jackson Transit Authority v. Local Division 1285, ATU, supra.*

CONCLUSION

For the foregoing reasons, the Mass Transit Administration respectfully requests that this Honorable Court deny Petitioner's Request For *Writ Of Certiorari.*

Respectfully submitted,

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APPENDIX

In The United States District Court
for the District of Maryland

Civil Action No. R-82-2990

Richard Byrne,

Plaintiff

v.

Mass Transit Administration
and
Amalgamated Transit Union

Defendants

MEMORANDUM AND ORDER

Plaintiff, Richard Byrne, a former employee of Mass Transit Administration (hereinafter cited as MTA) and a member of Amalgamated Transit Union, Division 1300 (hereinafter cited as Amalgamated), defendants herein, brings this action under the Labor Management Relations (Taft-Hartley) Act of 1947 § 301(a), 29 U.S.C. § 185(a) (1976) (hereinafter cited as the Act). In his complaint, plaintiff alleges that MTA's discharge of him on or about October 21, 1981, was without just cause, thereby violating the collective bargaining agreement then in effect between MTA and Amalgamated. Plaintiff also alleges that Amalgamated's conduct during the grievance proceedings concerning his discharge constituted material breaches of the duty of fair representation that Amalgamated owed him.

Presently pending before this Court are motions to dismiss filed by both defendants in the above-captioned action. In support of their motions, defendants argue that

this Court lacks subject matter jurisdiction over this proceeding under the Act, and that this Court should abstain from entertaining this suit in light of plaintiff's commencement of an identical action in state court. In his response to these motions, plaintiff admits that Congress exempted state instrumentalities from the coverage of the Act. Nonetheless, plaintiff argues that the conduct by defendants of which he complains presents a cognizable claim under the commerce clause of the United States Constitution or under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1976). In addition plaintiff argues that if the Court finds it lacks jurisdiction over his complaint, the Court should dismiss the action without prejudice to his pending state court proceeding. Oral argument is unnecessary and the Court rules pursuant to Local Rule 6. For the following reasons, the Court grants defendants' motions to dismiss.

As a preliminary matter, plaintiff's invocation of this Court's jurisdiction pursuant to the commerce clause of the federal Constitution or to the Federal Arbitration Act is belated. A well-established tenet of federal jurisprudence holds that the subject matter jurisdiction of a federal court must be alleged on the face of the complaint and not in plaintiff's response to a motion to dismiss. *See, e.g., McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936); Fed. R. Civ. P. 8(a)(1). *See generally* Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction § 3522* (1975) and cases cited therein. Another time-honored principle holds that if the jurisdictional facts are challenged, the party claiming jurisdiction has the burden to demonstrate that the federal court has subject matter jurisdiction. *See, e.g., Thomson v. Gaskill*, 315 U.S. 442 (1942); Wright, Miller & Cooper, *supra* at § 3522, and cases cited therein. Accordingly, the Court will not address the alternative jurisdictional allegations con-

tained in plaintiff's response to defendants' motions to dismiss.[1]

Section 185 of the Act provides in pertinent part that this Court shall have jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations . . ." 29 U.S.C. § 185(a) (1976). Section 152 of the Act further provides that:

> "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof. . . ."

Id. at § 152(2).

Although it does not appear that the Fourth Circuit has addressed the question of whether the Act applies to state employees, recent decisions in other jurisdictions that have construed section 152(2) have held that this section exempts state and local governments and their employees from the Act. In *Ayres v. IBEW*, 666 F.2d 441 (9th Cir. 1982), the Ninth Circuit held that, in the absence of clear Congressional intent to the contrary, "section 301(a) of the Act, 29 U.S.C. § 185(a), does not grant this court jurisdiction over the claims of an individual employed by a political subdivision of a state." *Id.* at 444. Similarly, the Third Circuit also concluded that public employees were excluded from the provisions of the Act after an in-depth examination of its plain language and accompanying legislative history. *See Crilly v. Southeastern Pennsylvania*

[1] Even though the Court need not consider the jurisdictional allegations contained in plaintiff's response, the Court notes parenthetically that plaintiff has failed to carry his burden of showing subject matter jurisdiction as required by *Thomson, supra.*

Transportation Authority, 529 F.2d 1355 (3d Cir. 1976) (seminal case construing § 152(2)). *See also Amalgamated Transit Union, Division 819 v. Byrne*, 568 F.2d 1025, 1029 (3rd Cir. 1977) (". . . the statutory definition of the term 'employer' specifies that it does not include 'any State or political subdivision thereof.' 29 U.S.C. § 152 (Supp. 1977). Thus, to the extent that New Jersey is here acting like a private purchaser of services, Congress has explicitly exempted it from the proscriptions of the NLRA."). In construing section 13(c) of the Urban Mass Transportation Act of 1964, the Supreme Court noted in dictum that section 152(2) excluded public employees from the operation of the Act:

> ". . . labor relations between local governments and their employees are the subject of a long standing statutory exemption from the National Labor Relations Act. 29 U.S.C. § 152(2). Section 13(c) evinces no congressional intent to upset the decision in the National Labor Relations Act to permit state law to govern the relationships between local governmental entities and the unions representing their employees."

Jackson Transit Authority v. Local Division 1285, ATU, 102 S. Ct. 2202, 2207 (1982). The Supreme Court's delineation of the scope of section 152(2) in *Jackson Transit Authority* is squarely consistent with the construction of that section as articulated in the above-mentioned decisions of circuit courts in other jurisdictions. Accordingly, this Court adopts this construction and holds that section 152(2) excludes state governments and their employees from the operation of the Act.

MTA, one of the defendants herein, is undisputably an agency and instrumentality of the State of Maryland. *See Md. Transp. Code Ann.* § 7-101 *et seq.* (1977); *Mass Transit Administration v. Household Finance Corp.*, 292 Md. 313, 439 A.2d 1104, 1105 (1982) ("MTA is a unit in

the Department of Transportation, a principal department of the State of Maryland."); *Harden v. Mass Transit Administration*, 277 Md. 399, 354 A.2d 817 (1976). Indeed, plaintiff alleges in his complaint that MTA ". . . is an agency of the State of Maryland . . ." Pursuant to the holdings of the above-mentioned authorities, MTA, as an agency of the State of Maryland, is not an "employer" within section 152(2), and, therefore, is not an "employer" within section 185(a) of the Act. *See, e.g., Ayres*, 666 F.2d at 444; *Crilly*, 529 F.2d at 1360-63. Absent any other basis for invoking this Court's jurisdiction, the Court lacks subject matter jurisdiction over the claim plaintiff asserts against MTA. Consequently, the motion to dismiss filed by MTA is hereby granted.

The dismissal of the action as to defendant MTA for the above-mentioned reasons also mandates the dismissal of the action against Amalgamated, the remaining defendant. A plain reading of sections 185(a) and 152 of the Act requires such a result under at least two alternative grounds. First, as stated earlier, there are only two circumstances under which this Court may entertain an action pursuant to section 185(a): a suit alleging a violation of a contract between an employer and a labor union, or between two labor unions. Neither circumstance is present in the instant proceeding. This action clearly does not involve a contract dispute between two unions. Absent the existence of an "employer" within the meaning of the Act to which section 185(a) applies, there is no contract dispute between an employer and union over which this Court can exercise its jurisdiction. Consequently, this Court lacks subject matter jurisdiction to consider plaintiff's claim against Amalgamted. Second, since MTA is not an "employer" within the meaning of the Act, its workers are not "employees" within the meaning of the Act. Section 152(3) specifically excludes from the application of the Act those workers who are employed by

employers that are not covered by the Act. 29 U.S.C. § 152(3) (1976) ("the term 'employee' shall include any employee . . . but shall not include . . . any individual employed . . . by any person who is not an employer as herein defined."). Consequently, Amalgamated is not "a labor organization representing *employees*" whose contract disputes with an employer fall within the application of the Act under the circumstances presented herein. *Id.* at § 185(a) (emphasis added). Absent a contract dispute involving a labor union whose members are employees covered by the Act, this Court lacks subject matter jurisdiction over the claim asserted by plaintiff against Amalgamated.[2] Accordingly, this Court is required to dismiss the action as to Amalgamated.

Because of the dismissal of the action for want of subject matter jurisdiction, defendants' alternative argument in support of dismissal, *i.e.*, abstention, has been rendered moot and the Court need not address it.

Notwithstanding the inapplicability of the Act to defendants herein, plaintiff's complaint nonetheless suggests the type of alleged grievance which otherwise would be traditionally actionable thereunder. In light of the above-mentioned federal caseload directing public employees to seek their remedies in state courts, the court grants defendants' motions to dismiss without prejudice to plaintiff's pending action in state court.

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[2] The court in *Crilly* would have agreed with the foregoing analysis of the second basis warranting dismissal:

> It should also be noted that the definition of employee in § 2(3), of the Wagner Act, 29 U.S.C. § 152(3), is dependent upon the definition of employer. Thus, if SEPTA is not an employer for the purposes of the Act, the Local's members cannot be employees, and there is no federal jurisdiction over either the fair representation or the breach of contract claims.

Crilly, 529 F.2d at 1357 n.5.

For the reasons stated herein, it is this 23rd day of November, 1982, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendants' motions to dismiss are GRANTED without prejudice to plaintiff's pending action in state court; and,

2. That the Clerk will mail copies of this Memorandum and Order to all counsel of record.

NORMAN P. RAMSEY,
United States District Judge.

In The United States District Court
for the District of Maryland

Civil Action No. R-82-2990

Richard Byrne,

Plaintiff

v.

Mass Transit Administration
and
Amalgamated Transit Union

Defendants

JUDGMENT

In accordance with the Memorandum and Order dated November 23rd, 1982, and filed in the above entitled case, it is

ORDERED and ADJUDGED:

That judgment is hereby entered in favor of the defendants and against the plaintiff.

NORMAN P. RAMSEY,
United States District Judge.